



Employment Law Note

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Fall Updates



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As we wind up the calendar year, employers should take note of legislative changes enacted during 2022, as well as those anticipated in the new year.

Washington Paid Family and Medical Leave (PFML)

PFML provides qualified employees with the following maximum leave amounts per calendar year: (a) up to 12 weeks of paid family or medical leave; (b) up to 16 weeks of leave when family and medical leave are used in combination; and (c) an additional two weeks of leave due to pregnancy complications. Unlike the federal Family Medical Leave Act (FMLA) where eligibility is determined through employer/employee interactions, for PFML, employees apply directly to the Washington State Employment Security Department (ESD) to request leave and the ESD determines employee eligibility and administers the program.

In January 2022, the ESD announced that it may face cashflow issues due to the pandemic and the growth of the program. In response, SB 5649 was enacted changing the scope of PFML benefits and requirements. These amendments, which generally took effect on June 9, 2022, include:

- **Increased Premiums.** Starting on January 1, 2023, the total premium rate will be 0.8%. Employers will pay 27.24% of the total premium and employees will pay 72.76%. Employers may not retroactively withhold premiums from employees.
- **Bereavement Leave.** Compassion leave is a new qualifying event. Up to seven days following the death of a newborn or newly adopted/fostered child, an employee who would have qualified for

either medical or family leave for the birth or adoption/placement of that child is entitled to PFML leave. Miscarriages are included in this definition.

- **Postnatal Leave as Medical Leave.** The first six weeks after childbirth automatically qualifies as medical leave if the employee so elects. The employee does not have to submit additional medical paperwork for the leave to be classified as such.
- **Waiting Period Clarification.** The seven-day waiting period no longer applies to medical leave taken for the birth of a child. In addition, the waiting period will not reduce the PFML benefits available to employees.
- **Expiration Date for CBA Exemptions.** The law formerly exempted employees with collective bargaining agreements (CBAs) in existence on October 19, 2017, that had not since been opened for renegotiation. That exemption now expires, and employers have until January 1, 2024, to comply.
- **Publication.** Employers with voluntary plans are published on the ESD's website.

Finally, while the best practice is to avoid errors, in the unfortunate event that an error is made, the ESD is required to engage in Conferences and Conciliation with employers. Specifically, as outlined in WAC 192-570-010, the Department has a clear directive to work with employers to correct good-faith errors without assessing additional penalties.

New Washington Minimum Wages

In 2023 Washington's minimum wage will be \$15.74 per hour. This increase exempts employee and rideshare driver wages as follows:

Exempt Employees. For exempt employees working for small employers (1-50 employees), their hourly wage will be 1.75 times the minimum wage, equating to their earning at least \$1,101.80 a week (\$57,293.60 a year). For exempt employees working for large employers (51 or more employees), their hourly threshold is 2 times the minimum wage, equating to their earning at least \$1,259.20 a week (\$65,478.40 a year). Finally, for exempt computer professionals being paid an hourly rate, regardless of employer size, the 2023 applicable hourly rate is 3.5 times the minimum wage, equating to \$55.09 per hour.

Rideshare Drivers. For Uber, Lyft and other rideshare drivers, within Seattle, drivers will earn 64 cents per passenger minute and \$1.50 per passenger mile, or \$5.62 per trip, whichever is greater. For trips outside of Seattle, drivers will earn 37 cents per passenger minute and \$1.27 per passenger mile, or \$3.26 per trip, whichever is greater.

New EEOC Poster

On October 19, 2022, the U.S. Equal Employee Opportunity Commission (EEOC) released an updated poster titled, "Know Your Rights." Federal law requires covered employers to prominently display this poster at worksites in a location that is accessible to applicants and employees with disabilities that limit mobility. The new poster contains plain language and bullet points concerning information on discrimination based on:

- Race, color, sex (including pregnancy and related conditions, sexual orientation, or gender identity), national origin, religion;
- Age (40 and older);
- Equal pay;
- Disability;
- Genetic information (including family medical history or genetic tests or services); and includes
- Retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding.

The new changes include identifying harassment as a prohibited form of discrimination; clarifying that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, and gender

identity; adding a QR code to assist employees in obtaining information needed to file charges; and providing information about equal pay discrimination for federal contractors.

The poster is currently available in English and Spanish at <https://www.eeoc.gov/poster>.

Proposed Federal Rulemaking for an Employee vs. an Independent Contractor (Again!)

The U.S. Department of Labor (DOL) has published yet another proposed rule defining an "employee" versus an "independent contractor" under the Fair Labor Standards Act (FLSA). To recap the history of the DOL's recent attempts to define these terms, prior to January 2021 companies followed judicial precedent because there was no express definition. Then, in January 2021, the DOL, under former President Donald Trump's administration, published a notice of rulemaking that the DOL would use an "economic realities" test. The test, effective March 8, 2021, was to focus on: (i) the nature and degree of control over the work; and (ii) the worker's opportunity for profit or loss. Then, on March 4, 2021, under President Joe Biden's administration, the DOL delayed the effective date of the new test only to have a federal District Court, on March 14, 2022, vacate the delay. While the Court's decision would have reinstated the DOL's "economic realities" test, upon appeal, the Fifth Circuit stayed the litigation.

The DOL has now published a new proposed rule defining an "employee" versus an "independent contractor." The proposed rule would restore the pre-January 2021 multi-factor, totality-of-the-circumstances analysis that includes the consideration of factors relating to: (1) the opportunity for profit and loss depending on managerial skill; (2) investments by the worker and the employer; (3) degree of permanence of the work relationship; (4) nature and degree of control by the employer over the worker; (5) extent to which work performed is an integral part of the employer's business; and (6) skill and initiative. There is also a seventh catchall that allows additional factors to be considered if the factors help demonstrate whether the worker is in business for themselves or economically dependent on the employer.

Employers have until November 28, 2022, to submit comments on the proposed rulemaking. Any employer wishing to comment on this proposed rule is welcome to contact us for more information concerning the best way to do so. Stay tuned for the final rule.

As Always...

If you have questions or would like to discuss issues raised by this note, please do not hesitate to reach out to our office. Happy Holidays!

For more information about this month's Employment Law Note contact us at [425-454-4233](tel:425-454-4233)



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